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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-355

PULITZER PUBLISHING COMPANY,
Petitioner,

against

MERNA MACBRIDE LAZIER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ducing into the paper daily illustrated articles by another food editor so as to gain acceptance for her articles instead of those of respondent, and to discontinue respondent's article. These libels constituted a calculated falsehood which casts a different light on the constitutional question than that announced in the New York Times case and other subsequent cases, and are excepted from the operation of the constitutional guaranties. Garrison v. Louisiana, 379 U. S. 64, at page 75, 85 S. Ct. 209, 13 L. Ed. 2d 125, and Rosenbloom v. Metromedia, Inc., 91 S. Ct. 1811, decided in 1971 11

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SUPPLEMENTAL STATEMENT

The case in question involves a business libel. Respondent had for many years prepared and written articles which appeared under her by-line in the Sunday Supplement of petitioner's paper dealing with preparation of food, entitled "My Favorite Dish." It was illustrated by colored photographs of persons preparing the dish taken by a staff photographer. As appears from the opinion of the Supreme Court of Missouri and the evidence, her articles bearing her by-line reading, "By Merna Lazier," had been published weekly in over 600

different issues (Appendix, Petitioner's Brief, p. A-9). For years, Respondent had been held out by Petitioner as the author of this particular article. Plaintiff's Exhibit 9 (our Appendix B1), which appeared in Petitioner's newspaper advised its readers in 1962 that full color photos illustrating how to prepare a George Washington cake would appear shortly. This was to be one of a series of full color photos and recipes from a Williamsburg cookbook, dated 1780, the advertisement then went on to state, "By Merna Lazier and Arthur Witman, pictures." Examination of the exhibits comprising the articles, "My Favorite Dish", Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 27, 28, 29, 30 filed with this Court show that Mr. Witman was a photographer and the articles all bore the by-line, "By Merna Lazier." Furthermore, this teaser advertisement had admittedly been seen by Arthur Bertelson, managing editor of petitioner's newspaper, before he wrote the libelous letter in question to a Mrs. Nordman (Tr., p. 160). Reproduced in full in the opinion of the Missouri Supreme Court (Petitioner's Appendix at A2 and A3). As early as 1956, defendant carried an article dealing with seven St. Louisans about to take a trip to Russia. Among those listed in the article was the respondent, saying in part, "Merna Lazier, who writes 'My Favorite Dish' food feature in the St. Louis-Post Dispatch Pictures magazine." (Plaintiff's Exhibit 10, Respondent's Appendix B2).

In January of 1965, respondent's by-line was dropped by petitioner from her articles. Thereupon, the evidence shows that two letters were written, one by a Mrs. Nordman, to the then managing editor Mr. Arthur Bertelson, of the petitioners newspaper, at the time of trial, advanced to executive editor, and the other letter by a Mrs. Henderson to Mr. William Bransted, who at the time of trial and at the time of the writing of the libelous letters, was editor of the Sunday Pictures section in which respondent's articles had appeared. The Nordman letter, dated

February 5, 1968, stated in substance that the article "My Favorite Dish," had been done by Mrs. Lazier; that for the last past weeks she (Mrs. Nordman) had not seen Mrs. Lazier's name on the article and was wondering whether she was still doing them, and, if not, could she trust the party who might be. She asked the editor of the paper as to who was now doing these articles and enclosed a self-addressed, stamped, envelope for Bertelson's convenience in replying. (Plff's. Exhibit 16, verbatim copy set forth in Mo. Supreme Court. Opinion, p. A 2 and A 3 of appendix to petitioner's Petition herein.) This letter was not answered by Mr. Bertelson until February 22, 1965, when he wrote: "The person who has written 'My Favorite Dish' for many years is still writing it. Your friend, Mrs. Lazier, never was the author. All she did and still does was arrange the picture taking and check the recipes." (Plaintiff's Exhibit 17 in the Missouri Supreme Court's Opinion reproduced verbatim; Appendix A 3 of Petitioner's petition herein).

The other letter involved, the Henderson letter, which was received by petitioner and which was answered by William Bransted, the Sunday editor who was in charge of that department. It was written by another subscriber to the paper, in that case, a Mrs. Henderson, a librarian, which letter stated in substance that she was required in her work to read each week Merna Lazier's "Favorite Dish" and that it had been disturbing to her that for the many years in which Mrs. Lazier's articles had appeared in the Sunday pictures that her articles no longer carried her by-line and that her name gave authority to the feature (Exhibit 18, in same Opinion verbatim p. A 6, Appendix to Petitioner for Writ). In answer to which the Sunday editor, wrote among other matters that the omission of Mrs. Lazier's name has no bearing on the authenticity of the article, "As in the past, subjects are suggested by a number of persons and writing continues to be done

largely by his assistants (Plaintiff's Exhibit 19 verbatim in same Court's Opinion p. A-7 of Appendix to Petitioner's application).

This case does not involve a newspaper article, nor a radio broadcast with reference to this matter, but simply a business libel impugning on respondent's ability as a writer and denying that she was ever the author of these articles bearing her by-line. The petitioner takes the position that as a newspaper, it was protected under the 1st and 14th amendments to the Constitution of the United States in writing these libelous letters. Mr. Bertelson, the managing editor, claimed on direct examination, when called by petitioner, that the article, "My Favorite Dish," in January of 1965 and before that had been written by Robert Hannon, who was the assistant to the editor of the Sunday Pictures and before that, by a number of other people (Tr., p. 147). On cross-examination, however, he admitted that he had never consulted respondent's personnel file to see when she had gone to work before he answered this letter (Tr., p. 163). He further admitted before answering this letter that he never looked at any of the copy that she had previously handed in to determine whether she was the author of these articles (Tr., p. 151). He admitted further that as managing editor he was in almost daily contact with everybody who worked in the various departments and that included the picture section, and he knew what was going on in those departments. He stated that he knew at that time, February 22, 1965, what methods were being used and the pictures that were used in printing every portion of the paper (Tr., p. 156). He also admitted that he had seen the prior ad of 1962 referred to above in Petitioner's paper stating that the article on the George Washington cake would be by Merna Lazier and Arthur Witman, pictures (Tr., p. 160).

He further admitted that he had never called the respondent in and spoken to her or asked her what she had

done in the past with reference to writing these articles before answering the Nordman letter, although two weeks had expired between Mrs. Nordman's letter had been written and his reply (Tr., pp. 148-149). In this case there was no question of "Hot" news for Bertelson took plenty of time within which to answer this inquiry.

Petitioner also avoids in its statement of facts or elsewhere in its Petition for Writ of Certiorari the admissions by Messrs. Bertelson and Bransted, that these libelous letters were written not for the purpose of disseminating news to the public generally; but had for their purpose a calculated falsehood on the part of petitioner to build up the reputation of their food editor Mrs. Brainard in the reader's mind as they had succeeded in printing in color in the daily edition articles on food, written by Mrs. Brainard, the food editor and had decided to discontinue respondent's articles appearing in the Sunday Supplement after dropping respondent's by-line. On direct examination, in answer to the question put by petitioner's counsel as to why they had decided to drop the article, "My Favorite Dish," Bertelson stated (Tr., pp. 147-148):

> "A. Because we were making progress in the development of a new technical process in the newspaper, in the paper color, and we wanted to do a cooking or food feature in the daily paper rather than in the Sunday paper, and we still have a food editor whose name is Dorothy Brainard, and we wanted to concentrate on Mrs. Brainard's contributions to the paper, and to eliminate any stories which might detract from her expartes [sic] in the eyes of our readership.
>
> Q. Now, if you dropped 'My Favorite Dish,' what would happen to Mrs. Lazier?
>
> A. I beg your pardon?
>
> Q. If you dropped 'My Favorite Dish,' what would happen to Mrs. Lazier?

A. Well, she probably would have been dismissed.

Q. Why?

A. Because when the feature is eliminated, then the person who contributes to this feature has no further function in the office and we feel free to let them go."

Such and more appears also from Mr. Bertelson's admissions on cross-examination at (Tr. p. 155) where the following appears:

"Q. As I understand it, for sometime before 1965, when Mrs. Lazier's by-line was dropped, you had decided as soon as you had developed sufficient color printing on the daily newspaper portion of your paper, that then you would drop Mrs. Lazier's name, is that right?

A. That's right.

Q. Now, let me ask you this: Was it not your purpose, after you decided that you could reproduce this in your daily paper, to try and get the people used to reading the script or the article published under the name of Mrs. Bransted, is that right? I mean Mrs. Brainard.

A. Yes, sir.

Q. Yes. And you also had in mind, did you not, to bolster the name of Dorothy Brainard?

A. Yes, sir.

Q. And then when you got to that point, that was in 1965, then is when you wrote the letter, is it not, to Mrs. Nordman, in answer to her inquiry about who was writing the articles, that Mrs. Lazier never wrote them, is that right?

A. Yes, sir.

Q. And that was partly, it was your purpose to bolster the name of Dorothy Brainard?

A. Yes, sir."

Similar testimony was given by the Sunday editor, Mr. William Bransted, Transcript pages 180-181, where it ap-

pears that what was being done by the employer constituted a calculated falsehood. The Supreme Court of Missouri in is Opinion, therefore, concluded:

> "Unquestionably, defendant newspaper, over a period of years, held plaintiff out as the author of the feature 'My Favorite Dish.' There is substantial evidence in the record that the two letters to the contrary were libelous. They directly imputed that plaintiff, whose profession or business, according to her evidence, was that of an author and authority on cooking (based in large part on the 'My Favorite Dish' series) was not its author and had only a minor part in its production. The letters come close to making her out a fraud." [A-8, of appendix to petition for writ.]

The opinion goes on to say:

> "The fact is that over a period of years, in 52 issues per year, something over 600 times, defendant by publishing 'My Favorite Dish' over plaintiff's by-line, held Mrs. Lazier out to its readers as the author, a belief which, we feel safe in saying, was shared by the readers. Mr. Bertelson's motive behind his letter, the jury could find, was more to promote reader acceptance of the change he knew was in the offing—the dropping of the feature—and the 'bolstering' of the paper's regular food editor and her food articles in the daily paper, so as to retain Mrs. Nordman and others like-minded, as purchasers of the paper, than it was to inform Mrs. Nordman of the facts as he believed them to be on plaintiff's part in 'My Favorite Dish'; that defendant wanted to lead its readers to believe the removal of plaintiff's name as the apparent author of 'My Favorite Dish' would in no wise lessen the quality of future articles, because plaintiff had never been the author, had handled only aspects

of the publication not involving cooking expertness, and the real author remained unchanged. Likewise, as to Mr. Bransted, the jury could have believed from the evidence that, he, too, had another ax to grind than merely expressing his honest, though mistaken, belief, as to what plaintiff did in writing the article; that he was minimizing plaintiff's part so as to make more acceptable to the defendant's readers the charge he knew was coming in the foods part of the newspaper, where Mrs. Lazier would be out and someone else would be presented as the paper's expert on the subject. There was evidence, therefore, from which the jury could infer bad faith, improper motives, and actual malice, which would destroy the qualified privilege and permit a recovery, Skain v. Weldon (Mo. Sup.), 422 S. W. 2d 271. We hold that plaintiff made a submissible case."

These facts throw an entirely different light on this libel case.

ARGUMENT

I

The Supreme Court Court of Missouri Correctly Decided That the Rule of *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 684, and Other Cases Relied on by Petitioner Adopting That Rule, Including the Very Recent Case of *Rosenbloom v. Metromedia, Inc.*, 91 S. Ct. 1811, Decided in 1971, Was Not Applicable to the Facts of This Case, Because This Case Presents a Clear Exception Thereto. The Libel Uttered by Petitioner in This Case Did Not Involve Either a Public Figure or a Matter of Serious Public Concern. It Involved a Business Libel Affecting One of Its Own Writer's Reputation by Asserting in Answer to Two Letters From Subscribers Inquiring About the Dropping of Her By-Line From Certain Articles on Preparation of Food That the Respondent Never Was the Author of the Different ~~Recipes~~ ARTICLES Published Under Her By-Line and Which Had Been Published by Petitioners for Over 13 Years in 600 Different Sunday Supplements of Petitioner's Paper.

As we have shown by our supplementary statement, this case does not involve a libelous article appearing in a newspaper, nor a libelous radio broadcast but is simply a business libel. It consisted of the writing of two letters on behalf of petitioner herein, one by the managing editor and one by the Sunday editor for whose department respondent worked in answer to inquiries by two readers as to why respondent's by-line bearing her name had been dropped and no longer appeared on articles in the Sunday illustrated supplement dealing with cooking. These libelous letters, written by petitioner, denied that she ever was the author of these articles which petitioner had published un-

der her by-line for a period of thirteen years. All of the cases upon which petitioner relies, beginning with **New York Times v. Sullivan**, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 684, and the other cases referred to under "ii" in its citation of cases relied upon by petitioner in its Petition involve either a public figure or a matter of serious public concern. But clearly respondent is not a public figure nor was this a matter of public interest in the correct constitutional sense.

After reviewing the transcript, the Missouri Supreme Court held specifically (pages A-10, last paragraph and A-11, 1st paragraph of the Appendix to the Petition) that by no streteh of the imagination, could respondent be considered a public figure for she was not so widely known that the rule as to public officials should be applied to her in the libel action, nor was this a case where respondent had drawn herself or been drawn into the middle of any sort of intense public controversy. It also held that there was no evidence that respondent had ever been the subject of substantial press, radio or television news comment, or that she occupied a place in the public eye to the point where, as a writer of cooking recipes, it is quite likely that her activities might be erroneously reported either by the newspaper as a newspaper or by its editors in replying to letters about her from readers.

II

The Libels in This Case Stating That Respondent Was Not the Author of These Articles Were Uttered by the Managing Editor and the Sunday Pictures Editor With the Admitted Ulterior Motive of Downgrading Respondent in the Eyes of These Two Readers of This Supplement Containing Her Recipes and for the Purpose of Introducing Into the Paper Daily Illustrated Articles by Another Food Editor So as to Gain Acceptance for Her Articles Instead of Those of Respondent, and to Discontinue Respondent's Article. These Libels Constituted a Calculated Falsehood Which Casts a Different Light on the Constitutional Question Than That Announced in the *New York Times* Case and Other Subsequent Cases, and Are Excepted From the Operation of the Constitutional Guaranties. *Garrison v. Louisiana*, 379 U. S. 64, at page 75, 85 S. Ct. 209, 13 L. Ed. 2d 125, and *Rosenbloom v. Metromedia, Inc.*, 91 S. Ct. 1811, Decided in 1971. . . .

But there is a still more cogent reason why the decision of **New York Times v. Sullivan**, 376 U. S. 284, 84 S. Ct. 710, 11 L. Ed. 2d 286, and subsequent cases decided by this Court applying that doctrine, do not apply.

With petitioner's admission in this case by its managing editor and by its Sunday Picture editor that the petitioner herein had an ulterior motive in libelously replying to the two letters of inquiry so as to downgrade respondent in the eyes of two of petitioner's readers so that petitioner could introduce daily illustrated articles written by their food editor, Brainard, put out under a new color process and thereby gain acceptance for her, as we have shown in our supplementary statement of fact, this case falls squarely into the recognized exception to the **Sullivan** case. As stated in **Garrison v. Louisiana**, 379 U. S. 64, at page 75, this Court stated the rule as follows:

"The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' **Chaplinsky v. New Hampshire,** 315 U. S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy consfitutional protection."

In the very recent case of **Rosenbloom v. Metromedia, Inc.,** 91 S. Ct. 1811, decided in 1971, in the majority opinion and on which petitioner so heavily relies, at page 1824, this Court states: "Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free expression' followed Garrison v. Louisiana, 379 U. S. 64, 75-76, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125 (1964)."

If there ever was a calculated falsehood to damage the respondent herein for the benefit of petitioner and its food editor, Mrs. Brainard, this was it, for admittedly, the purpose of falsely claiming that respondent was not the author of these articles was because the newspaper was trying to bolster the name of Dorothy Brainard as food editor to its readers, whose articles would appear daily but not Sunday and to discontinue respondent's articles and that was when these letters denying the authorship of these articles of respondent were written. That is precisely what the Supreme Court of Missouri held in its opinion appearing in supplement to plaintiff's petition at Pages A-8 to A-10 and, consequently, it did not apply to this case the protections afforded by the **Sullivan** case or by the **Rosenbloom** case, supra, and most decisions between the **Sullivan** and **Rosenbloom** cases. The **Rosenbloom** case is a case which has gone further than any so far decided by this Court in holding that a radio broadcast reporting the arrest of a private citizen engaged in the business of distributing nudist magazines on the grounds that he was selling obscene material, was afforded the same constitutional privilege as if he were a public figure because of the general public interest in Philadelphia involving the sale of such material. Even in that case it was brought out that the broadcast of this libelous information was based upon a call from a police captain who, according to defendant in that case, had previously been a source of reliable information and they had contacted as many sources as they could. In other words, it was a case of "hot" news. In this case it is certainly not that for in response to Mrs. Nordman's letter, dated February 5, 1965, the managing editor waited until February 22 of that year within which to answer and had plenty of time to make an investigation of this employee even were the **Sullivan** case applicable, which we have shown above, is clearly not so. We might also add that in the **Rosenbloom** case a special squadron of the

police department had been organized in response to a citizen's committee to enforce the city's obscenity laws. Consequently, that was a case involving a matter of general public concern in the community and not the case of an employer reporting libelously on an employee upon written inquiries by two of the subscribers why the lady's by-line had been dropped, which libelous replies knowingly were false and were uttered with the ulterior motive of furthering the selfish ends of petitioner herein. The Supreme Court of Missouri, consequently, was correct in its refusal to apply the standards of the **Sullivan** case and subsequent cases.

III

This Case Reached the Missouri Supreme Court on Two Assignments of Error:

A

An error in an instruction offered and given for petitioner purporting to be a definitional instruction, but which attempted to inject into the case the principle of the *New York Times* case which is not applicable here. The definitional instruction under Missouri practice must define specific words used in other instructions. This did not do so and was one of the grounds for reversal by the Supreme Court of Missouri. . . .

This case went to the Missouri Supreme Court on two grounds:

(A) An error in an instruction offered and given for petitioner herein;

(B) The exclusion of competent evidence offered on behalf of your respondent herein to prove as required by law that Mrs. Nordman, who, prior to the trial, had died, had actually received, read and understood the letter from Mr. Bertelson referred to above.

A

Taking up these points, Instruction 1A, as given on behalf of respondent-plaintiff in the case, we have reproduced in toto in our appendix hereto attached (Appendix B-3). The only difference between that and Instruction No. 2 involved the letter written by Mr. Bransted which is set forth verbatim in Instruction No. 2. All of the rest of that instruction is the same as Instruction 1A (Tr. 197). Instruction No. 23.06 (Supplement to Petition for Writ of Certiorari, p. A-13), prescribed that if, as was here, the defense of qualified privilege was raised and, if as here, the plaintiff's claimed that the privilege was abused, then Paragraph 4th of form Instruction 23.06 must be added, which it was. This addition in both Instructions 1A and 2 in itself cast on respondent herein quite a burden, particularly that part requiring the finding that the defendant knew the statement to be false, which burden defendant-respondent herein bore as shown under Argument No. II, but also requires that if that is not shown, then it must be shown that the defendant-petitioner herein made the statement without knowing whether it was true or false in reckless disregard for plaintiff's rights. Petitioner argues that the instruction should require at least a finding of negligence. This instruction requires recklessness which is a higher requirement. This practically follows the language of **New York Times v. Sullivan**, supra. But defendant was not satisfied with this, but asked for and the trial Court gave a definitive instruction which we have set out at page B4 of the appendix to our brief and which the defendant-petitioner does not even set forth in either his statement, brief or appendix.

The rule in Missouri, as held by its Supreme Court, is that if the language in a particular instruction needs defining, only the language as used in a particular instruc-

tion may be defined. This rule was disregarded by defendant-petitioner for, as the Supreme Court of Missouri held, it does not define any specific language in any of the other instructions given. Instruction No. 6 admittedly was an attempt on petitioner's part to inject the language from the **Sullivan** case (Petition for Writ, p. 5), which is not used at all in any given instruction. This, the Supreme Court held was error (Appendix to Writ of Certiorari, A-10, first full paragraph):

> "This case was tried in May 1969, and plaintiff used M. A. I instruction 23.06 as it then appeared. The only defensive instruction was defendant's No. 6 which did not then and does not now appear in M. A. I. and which read: 'The phrase "reckless disregard of whether they were true or false" as used in these instructions means that the writers of the letters entertained serious doubts as to the truth of the statements and made them with a high degree of awareness of their probable falsity.' We agree with plaintiff that the instruction is prejudicially erroneous because it purports to define a phrase which does not appear in any of the instructions, **Epps v. Ragsdale** (Mo. App.), 429 S. W. 2d 798.
>
> At first glance, it seems to relate to the case because it refers to 'writers of the letters' and uses the words 'reckless disregard,' which do appear in plaintiff's verdict-directing instruction, yet it purports to define a phrase which does not appear anywhere in the instructions. So, the instruction on one hand seems to apply and, yet, literally, it does not apply. This is not an approved method of instruction."

B

That the trial court had excluded competent evidence, involving the receipt by Mrs. Nordman, one of the persons writing one of the letters of inquiry, of the letter from

Mr. Bertelson, managing editor of petitioner's newspaper, in response thereto, containing one of the libelous statements here involved and by which evidence respondent offered to show receipt by Mrs. Nordman, who had died before trial, of the letter and that she opened same and read it, which is a necessary requisite in the proof of libel (Tr. pp. 44-48). The exclusion of the testimony on which offers of proof were made by plaintiff-respondent herein was held to be error and the lower court was instructed on re-trial to admit such evidence (Appendix to Petition for Writ of Certiorari, pages A-11, beginning with the first full paragraph through A-12):

> "One other thing should be mentioned since the case is being remanded for a new trial: there is no dispute that Mrs. Nordman received the letter written her by Mr. Bertelson. The Post-Dispatch, however, says there is no proof that Mrs. Nordman, who died before the trial, ever opened and read the letter, and, hence, no proof of its publication, one of the elements of every libel action. At the trial, the court seemed to go on the assumption that once the defendant admitted writing the letters, that was all plaintiff had to prove, and sustained objections of the defendant going to questions as to how plaintiff came to be in possession of Mr. Bertelson's letter to Mrs. Nordman. It appears from offers of proof that plaintiff is in a position to testify she received the Bertelson letter as an enclosure in a letter addressed to her, delivered in the mail, in an envelope bearing the return address of Mrs. Nordman. Thus, it is a fair inference that Mrs. Nordman sent plaintiff the Bertelson letter and it also is a fair inference that Mrs. Nordman, who wrote the Post-Dispatch and enclosed a stamped addressed envelope for a reply, opened and read the Bertelson letter when she received it. It has been held that 'The delivery of a letter to one

capable of reading it is sufficient to support an inference that the letter was read so as to leave it to the trier of the facts to say, whether, if the letter was received, the addressee acquired actual notice of its contents . . .', James v. Hutchinson (Mo. App.), 211 S.W.2d 507, 510. In addition, in the present case, there is the factor that Mrs. Nordman was interested enough in finding out the answer to her question that she furnished the Post-Dispatch with a stamped addressed envelope, which the defendant used for its reply, so the jury could reasonably infer Mrs. Nordman recognized the letter when it arrived and opened it to see what the Post-Dispatch had to say. We overrule defendant's contention that the required publication cannot be shown as to the Bertelson letter."

CONCLUSION

In this case, the petitioner urges on Page 10-A of its petition that it is on the horns of a dilemma whether to retry this case or apply for this writ, but it really is not for we believe there can be no question that there is going to have to be a retrial of this case because of the error of the trial court in giving an instruction offered by petitioner and the exclusion of competent evidence. Petitioner also speaks of a "bad" decision by the Missouri Supreme Court and further complains that newspapers in Missouri are continually defending libel suits and urges that if the doctrine of the **New York Times** case is applicable, this Court could terminate all of this litigation by reversing the Missouri Supreme Court's decision. Petitioner's counsel does not, however, state the type of libel suits they are defending and we feel satisfied that it will continue defending libel suits hereafter if based on the facts as developed in this case. Here the evidence in this case clearly shows an ulterior motive for publishing maliciously

the libelous falsehood by defendant-petitioner against plaintiff-respondent, whereby the selfish interests of defendant-petitioner were the compelling factors for these libelous statements; consequently, this case does not present an opportunity, as petitioner urges under heading II of the Reasons for Granting the Writ, for this Court to further delineate developing principles involving state libel cases and the First Amendment, particularly the questions left unresolved since **Rosenbloom v. Metromedia, Inc.**, 91 S. Ct. 1811. This certainly should await a case not involving, as here, obvious malice, the object of which was to promote defendant-petitioner's selfish motives by a libel.

For these reasons, the Writ of Certiorari should not issue to review the judgment and opinion of the Missouri Supreme Court.

Respectfully submitted

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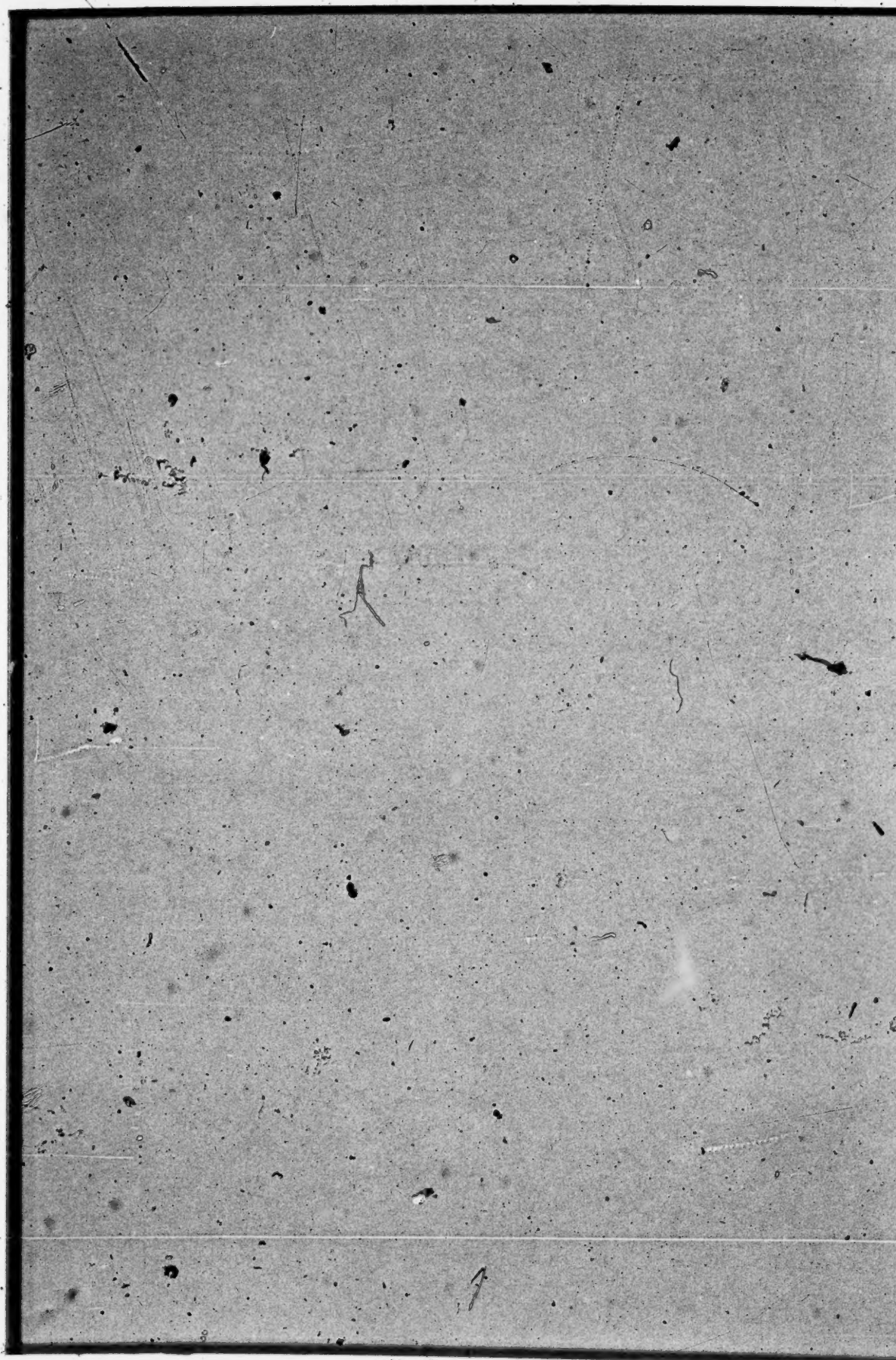

APPENDIX B-1

IN SUNDAY'S
ST. LOUIS POST-DISPATCH

"Famous Old American Recipes

Full-color photos illustrate how to prepare 'George Washington Cake,' a recipe from a Williamsburg family cookbook dated 1780. First of a Sunday series, By Merna Lazier and Arthur Witman.

PICTURES.

"Love Crowds Chess off the Board

The attractive U. S. women's champion, Lisa Lane, quits tournament play in favor of romance—finds she can't give the game the concentration it demands.

EVERYDAY MAGAZINE.

"What's Ahead for Cuba?

Washington Correspondent Richard Dudman assesses the results of the Punta del Este conference and of the expulsion of Castro's regime from the Organization of American States.

EDITORIAL SECTION.

"Rookie Cops' Night Patrol

In a new experiment, recent graduates of the St. Louis Police Academy are working as an intact platoon in the city's downtown district. Photos by David Gulick; story by Charles Menees.

PICTURES."

APPENDIX B-2

"7 ST. LOUISANS
LEAVE FOR TRIP
THROUGH RUSSIA

"Seven St. Louisans were to leave New York by plane today for a 15-day trip to Russia. They are members of one of the first Midwest groups to enter the Soviet Union since the start of the 'cold war' period. Two other members of the group live in Dallas, Tex., and another is from Vandalia, Ill.

"Among those making the tour, which will include a five-day stop in Moscow, are Mrs. T. M. Sayman, 5399 Lindell Boulevard; Merna Lazier, who writes the 'Favorite Dish' food feature in the Post-Dispatch Sunday PICTURES magazine, and Mr. and Mrs. Anthony Niedt, 14 Princeton Avenue, University City. Niedt is president of the Steelcote paint manufacturing firm.

"These four members will add a 10-day extension to their trip to visit Kiev, Odessa, Yalta and Stalingrad.

"The others, who plan to return to New York Aug. 17, are Bruce Hayward, news director for television station KTVI and announcer for radio station KXOK; Joseph Desloge, Jr., Vouziers, New Halls Ferry Road, Florissant, and Samuel Jacobs, president of Custom Furs, Inc."

APPENDIX B-3

INSTRUCTION NO. 1-A

"1. It is admitted by defendant that on or about November 22, 1965, its managing editor, Mr. Arthur R. Bertelson, wrote a letter containing a statement as follows: "Dear Mrs. Nordman:

"The person who has written 'My Favorite Dish' for many years is still writing it. Your friend, Mrs. Lazier, never was the author. All she did, and still does, was arrange the picture-taking and check the recipes.

Sincerely

/s/ Arthur R. Bertelson
Managing Editor"

Your verdict may be for the plaintiff if you believe:

2. That such statements tended to deprive plaintiff of the benefit of public confidence and damaged plaintiff's reputation.

3. That such statements were made by defendant in bad faith.

4. That such statements directed to Mrs. Nordman were read by her.

5. That such statement or statements so read were written by defendant, knowing them to be false or without knowing whether such statement or statements 'were true or false in reckless disregard' of plaintiff's rights and with intent to damage the plaintiff.

Instruction Given /s/ William E. Buder, Judge.

MAI 26.06 and 28.08 Tendered by Plaintiff.

Filed: May 21, 1969."

APPENDIX B-4

"INSTRUCTION NO. 6

"The phrase 'reckless disregard of whether they were true or false' as used in these instructions means that the writers of the letters entertained serious doubts as to the truth of the statements and made them with a high degree of awareness of their probable falsity.

Given: /s/ William E. Buder, Judge.

Filed: May 21, 1969."

"Not in M.A.I. Tendered by Defendant."